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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-174

DAVID JOHNSON and
ANTHONY VIGIL,
Petitioners,

v.

MOTOR VEHICLE DIVISION,
DEPARTMENT OF REVENUE,
STATE OF COLORADO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

Respondent accepts petitioners' statement concerning jurisdiction. A full understanding of this case requires reiteration that the decision of the Colorado Supreme Court was entered on appeal from summary judgment entered by the trial court. The facts presented to the trial court were undisputed by the parties, but the legal significance of those facts was, of course, the subject of argument.

The facts presented in the statement of the case contained in the petition for writ of certiorari are not disputed by respondent. In order to place the arguments of this opposition brief in perspective, respondent will restate the statement of the case and restate the question presented for review.

QUESTION PRESENTED FOR REVIEW

Should the federal judiciary intervene in the decision of the Colorado Supreme Court that a compelling state interest in the use for identification of driver's license photographs justifies the state in denying driver's licenses to applicants whose religious beliefs prevent them from complying with Colorado's mandatory license photograph requirement?

STATUTORY PROVISION INVOLVED

Petitioners attack the constitutionality of Colorado Revised Statutes (C.R.S.) 1973, 42-2-106(3) which requires that each application for a Colorado driver's license, and each license issued, contain the photograph of the applicant or licensee.

STATEMENT OF THE CASE

Petitioners brought this action in the Colorado state courts seeking declaratory relief and a permanent injunction. They challenged as unconstitutional a practice of the Motor Vehicle Division, Colorado Department of Revenue (the "department") whereby the department will not issue a Colorado driver's license to an applicant who refuses to permit his photograph to be taken for use on the license. The department's policy is required by C.R.S. 1973, 42-2-106(3).

After the filing of the complaint and answer, petitioners served on the department requests for admission which were admitted. Petitioners then moved for summary judgment. The department responded by filing a cross motion for summary judgment, supported by an affidavit of Leonard A. Boydstun, chief of the enforcement section of the Motor Vehicle Division, Department of Revenue.

The trial court subsequently denied petitioners' motion for summary judgment. Petitioners then filed an affidavit of David Johnson, one of the petitioners. After hearing the arguments of counsel the trial court on May 5, 1978 entered summary judgment for the department.

Petitioners filed an appeal with the Colorado Supreme Court. On April 30, 1979 that court, one justice dissenting, affirmed the trial court's entry of summary judgment. *Johnson v. Motor Vehicle Division*, ___ Colo. ___, 593 P.2d 1363 (1979). Petitioner's motion for rehearing was denied on May 21, 1979.

Petitioners are members of an organized and recognized religious body known as the Assembly of YHWHHOSHUA. Their religious beliefs prohibit them from permitting photographs to be taken of themselves. Although petitioners are otherwise qualified to drive, the department has refused to issue them driver's licenses because petitioners will not permit photographs to be taken of themselves. These facts were admitted by the department, which did not contest either the content of petitioners' religious beliefs, nor their sincerity.

In support of its position, the department contended before the trial court and on appeal that the state has a compelling interest in the mandatory photograph require-

ment arising from the unique properties of a photograph for identification purposes. The factual basis for the department's contention was the affidavit of Leonard A. Boydstun, in which he states that the driver's license photograph is a unique means of identification because it can easily be used by persons without specialized training. He further states that the photograph is necessary to identify violators of the motor vehicle and other laws of Colorado, that it is necessary to identify victims of accidents and natural disasters and that it is necessary to protect innocent drivers against abuse of their driver's licenses.

Petitioners did not file any affidavits which contradicted Mr. Boydstun's statements. They did file an affidavit of David Johnson, one of the petitioners, which states that petitioners need to drive in the course of their employment to attend church services, and to transport others to church services. Mr. Johnson further states in his affidavit that he will not permit his photograph to be taken because it would violate his religious beliefs, that he would permit other means of identification to be used on a driver's license and that neither he nor the other petitioners have engaged in criminal activity.

REASONS FOR DENYING THE WRIT

I.

THE COLORADO SUPREME COURT RULED IN ACCORD WITH PRIOR DECISIONS OF THIS COURT REQUIRING THE STATE TO SHOW A COMPELLING STATE INTEREST TO JUSTIFY AN INFRINGMENT OF THE RIGHT OF FREE EXERCISE OF RELIGION.

In his opinion for the Colorado Supreme Court, Justice Erickson recognizes that the religious nature of petitioners' belief and practices is conceded, and their sincerity not questioned. The opinion then quotes from this court's opinion in *Wisconsin v. Yoder*. 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed 2d 15 (1972) that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of relegion." Justice Erickson concludes that the state may legitimately impose burdens on an individual's right of free exercise of religion but that the state has a substantial burden to justify that infringment:

> "In brief, the state must demonstrate that its policies are backed by a compelling state interest and that no alternative less restrictive of religious freedoms will serve."

A copy of the opinion of the Colorado Supreme Court appears in the petition for writ of certiorari.

Since the department concedes that the mandatory photograph requirement imposes a burden on petitioners' free exercise of religion, Justice Erickson examines in his opinion the nature of the state interest advanced by the department in support of the photograph requirement. The court acknowledges that only a photograph provides a police officer with a ready and instantaneous means of identifying the driver as the person whose license is tendered. The opinion recognizes that the general assembly of Colorado has provided for the use of the driver's license as a generally recognized statewide means of ready identification.

Concluding that the state has shown a compelling interest, Justice Erickson carefully distinguishes this Court's decision in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). He states:

> "It is apparent that *Sherbert v. Verner, supra,* is a fundamentally different case than the one which is before us for review. The purpose of the regulatory scheme at issue in *Sherbert v. Verner* was to provide temporary relief for the involuntar-

> ily unemployed. The recognition of Sherbert's First Amendment claim did not conflict with the purpose of the requirement that she accept suitable work. In this case, photographic identification is an indispensable underpinning of the purposes underlying the state's interest in issuing driver's licenses. To provide exemptions would undermine its essential purpose. The ready certainty inherent in photographic identification would be lost. (*cite omitted*)."

Justice Erickson also points out that unlike the unemployment compensation scheme in *Sherbert*, no mechanism for exemption exists in this case. The court states that more wide-ranging interests are involved in this case than the untested assertion raised in *Sherbert* and adds that no religious discrimination is present under the Colorado statutory scheme.

The legal principles applied by the Colorado Supreme Court to the circumstances of this case are consistent with those announced by this Court in considering the scope of protection afforded by the First Amendment to the United States Constitution. This Court has consistently held that in the exercise of its police powers the state may regulate the activities of individuals even though those activities are based on religious beliefs. *Gillette v. United States*, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1960); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1879). Where a state requirement infringes upon a fundamental right of an individual the court must balance the interest of the state in its requirement against the burden placed on the individuals involved. *Wisconsin v. Yoder, supra*. The burden is upon the state, under such circumstances, to show a compelling state interest in its requirement. *Sherbert v. Verner, supra*.

This is not a case where the state restriction is directed primarily at religious beliefs. Contrast *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961). Rather the photograph requirement is directed primarily at status, acts and conduct, and the court properly engaged in weighing the interests of the parties. See *McDaniel v. Paty*, 435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978).

The Colorado Supreme Court therefore ruled in accord with the decisions of this Court in requiring the department to show a compelling state interest in the photograph requirement. In deciding that the state interest was compelling the Colorado Supreme Court considered properties of the photograph which were never disputed by petitioners, except to contest their relevancy to the constitutional problem. The Colorado Supreme Court also considered portions of Colorado law establishing a state interest in the use of a driver's license for identification purposes which has not previously been considered by this Court. This Court should not now intervene in the decision of the highest state court of Colorado that there exists a compelling state interest in the use of a photograph on a driver's license for identification.

II.

THE COLORADO SUPREME COURT DECLINED TO FOLLOW THE INDIANA SUPREME COURT ON THE BASIS OF DIFFERING STATE INTERESTS.

While this case was pending before the Colorado Supreme Court, the Indiana Supreme Court considered this same problem and concluded on the basis of the interests presented by the state there, that a mandatory driver's license photograph requirement must fail where it infringed on the free exercise of religious beliefs. *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, ____ Ind. ____, 380 N.E.2d 1225 (1978). The Colorado Supreme Court de-

clined to follow the decision of the Indiana court.

Petitioners argue that the decisions of the two state courts are irreconcilable. Analysis of the state court opinions shows that state interests are raised in Colorado which were not considered by the Indiana Supreme Court. The Indiana court, like the Colorado court, concludes that the state must show a compelling state interest in its photograph requirement. Unlike the Colorado court, the Indiana court does not find the interest advanced by its Bureau of Motor Vehicles to be compelling.

The Indiana court feels that statistics included on a license, such as license number, height, weight, eye and hair color, are sufficient to serve Indiana's interest in identification. The Colorado court, based on the record before it, clearly disagrees that such statistics are an adequate substitute for a photograph. The opinion of the Indiana court reflects that it did not have before it the contention that a photograph is a unique means of identification. The Colorado court concludes that the use of a driver's license for identification is, pursuant to Colorado law, a matter of state concern and not simply a privilege to be waived by the license holder, as the Indiana court concludes. The Colorado court's conclusion is based upon provisions of Colorado law which limit the liability of residents who rely upon the use of a driver's license for identification, and the provision for identification cards for residents who do not have driver's licenses. If similar provisions exist in Indiana, they are not discussed by that court.

These disagreements do not reach constitutional dimensions, nor do they require the intervention of the federal judiciary to correct any fundamental disagreement as to applicable legal principles. In light of these apparent differences the two decisions are not irreconcilable as petitioners contend.

CONCLUSION

The department does not disagree with petitioners that issues raised by this case are very important ones. However, the fact that the issues are important does not mean that this Court should exercise its jurisdiction where the Colorado Supreme Court has ruled consistently with the decisions of this Court, and considered particular issues and circumstances which are properly matters of state interest. For these and all the other reasons set out in this brief, the department respectfully submits that this Court should deny the petition for writ of certiorari.

Respectfully submitted

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